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# LEMUEL SHAW: AMERICA'S "GREATEST MAGISTRATE"<sup>†</sup>

LEONARD W. LEVY<sup>††</sup>

LEMUEL SHAW SERVED as Chief Justice of Massachusetts from 1830 to 1860, during an age which he said was remarkable for its "prodigious activity and energy in every department of life."<sup>1</sup> America was being transformed by the rise of railroads, steam power, the factory system, and the corporate form of business. A more complex society, urban and industrial, was superseding the older rural, agrarian one. Only a pace behind the astonishing rate of economic change came the democratization of politics and of society, while the federal system lumbered toward its greatest crisis. During this time Shaw delivered what is probably a record number of opinions for a single judge: over two thousand and two hundred, enough to fill about twenty volumes if separately collected.

At the time of his appointment to the bench, American law was still in its formative period. Whole areas of law were largely uncultivated, many unknown, and few if any settled. Although Shaw was not writing on a completely clean slate, the strategy of time and place surely presented an unrivaled opportunity for a judge of strength and vision to mold the law. His domain was the whole field of jurisprudence excepting only admiralty. No other state judge through his opinions alone had so great an influence on the course of American law.

One of the major themes of his life work was the perpetuation of what Oscar and Mary Handlin have called "the commonwealth idea"<sup>2</sup> — essentially a quasi-mercantilist concept of the state within a democratic framework. In Europe where the state was not responsible to the people and was the product of remote historical forces, mercantilism served the ruling classes who controlled the state. In America men put the social-contract theory into practice and actually made their government. The people were the state; the state was their "Common

<sup>†</sup> This article is based on a paper delivered by the author at the 1961 Conference of the Northeastern States Branch of the American Society for Legal History, held at Boston College Law School on September 30, 1961.

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1. Shaw, *Profession of the Law in the United States* (Extract from an Address delivered before the Suffolk Bar, May, 1827) *AMER. JUR.* VII 56-65 (1832).

2. OSCAR & MARY HANDLIN, *COMMONWEALTH. A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1784-1861* 31 (1947).

Wealth." They identified themselves with it and felt that they should share, as of right, in the advantages that it could bring to them as a community. The state was their means of promoting the general interest.

The Commonwealth idea precluded the laissez-faire state whose function was simply to keep peace and order, and then, like a little child, not be heard. The people of Massachusetts expected their Commonwealth to participate actively in their economic affairs. Where risk-capital feared to tread or needed franchises, powers of incorporation, or the boost of special powers like eminent domain, the duty of the state was to subsidize, grant, and supervise the whole process in the interests of the general welfare. But regulation was not restricted to those special interests which had been promoted by government aid. Banks, insurance companies, liquor dealers, food vendors, and others were all subjected to varying degrees of control, though the public trough had not been open to them. The beneficent hand of the state reached out to touch every part of the economy.

The Commonwealth idea profoundly influenced the development of law in Massachusetts. It was largely responsible for the direction taken by the law of eminent domain, for the development of the police power, and for the general precedence given by the courts to public rights over merely private ones. As employed by Shaw, the Commonwealth idea gave rise to legal doctrines of the public interest by which the power of the state to govern the economy was judicially sustained.

The idea "that some privately owned corporations are more public in character than others," as Edwin Merrick Dodd noted, "had already begun to emerge in judicial decisions before 1830."<sup>3</sup> The grant of powers of eminent domain to early turnpike and canal companies had been upheld because these were public highways, although privately owned. The mill acts, which originated as a means of promoting water-powered gristmills, had also been sustained in early decisions on the ground that a public purpose was served. While the earlier judges regretted the extension of the old gristmill acts to new manufacturing corporations, Shaw, by contrast, warmly accepted these acts because he believed that industrialization would bring prosperity and progress to the Commonwealth. Accordingly he declared that "a great mill-power for manufacturing purposes" was, like a railroad, a species of public works in which the public had a great interest. He even placed "steam manufactories" in the same class as waterpowered mills, as

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3. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860* 44 (1954).

devoted to a public use, although steam-powered factories were never granted powers of eminent domain.<sup>4</sup>

The Commonwealth idea underlay those remarkably prophetic opinions of Shaw's that established the basis of the emerging law of public utilities. The old common law of common calling had considered only millers, carriers, and innkeepers as "public employments"; it "knew no such persons as the common road-maker or the common water-supplier."<sup>5</sup> The "common road-maker," that is, the turnpike, bridge, and canal companies, were added to the list of public employments or public works while Shaw was still at the bar. But it was Shaw who settled the legal character of power companies,<sup>6</sup> turnpikes,<sup>7</sup> railroads,<sup>8</sup> and water suppliers<sup>9</sup> as public utilities, privately owned but subject to regulation for the public benefit. He would have included even manufacturers and banks. The Commonwealth idea left no doubt as to whether the state would master or be mastered by its creatures, the corporations, or whether the welfare of the economy was a matter of public or private concern.

The police power may be regarded as the legal expression of the Commonwealth idea, for it signifies the supremacy of public over private rights. To call the police power a Massachusetts doctrine would be an exaggeration, though not a great one. But it is certainly no coincidence that in Massachusetts, with its Commonwealth tradition, the police power was first defined and carried to great extremes from the standpoint of vested interests. Shaw's foremost contribution in the field of public law was to the development of the police-power concept.

The power of the legislature "to trench somewhat largely on the profitable use of individual property," for the sake of the common good, as Shaw expressed the police power in *Commonwealth v. Alger*,<sup>10</sup> was consistently confirmed over thirty years of his opinions. Three decades later, when judges were acting on the supposition that the Fourteenth

4. See *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475 (1853); *Palmer Co. v. Ferrill*, 34 Mass. (17 Pick.) 58 (1835).

5. *Dodd op. cit. supra* note 3, at 161.

6. See *Gould v. Boston Duck Co.*, 79 Mass. (13 Gray) 442 (1859); *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475 (1853); *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113 (1851); *Chase v. Sutton Mfg. Co.*, 58 Mass. (4 Cush.) 152 (1849); *Cary v. Daniels*, 49 Mass. (8 Met.) 466 (1844); *French v. Braintree Mfg. Co.*, 40 Mass. (23 Pick.) 216 (1839); *Williams v. Nelson*, 40 Mass. (23 Pick.) 141 (1839); *Palmer Co. v. Ferrill*, 34 Mass. (17 Pick.) 58 (1835); *Fiske v. Framingham Mfg. Co.*, 29 Mass. (12 Pick.) 68 (1831).

7. *Commonwealth v. Wilkinson*, 33 Mass. (16 Pick.) 175 (1834).

8. *City of Roxbury v. Boston & Providence RR.*, 60 Mass. (6 Cush.) 424 (1850); *Newbury Tpk. Corp. v. Eastern R.R.*, 40 Mass. (23 Pick.) 326 (1839); *Boston Water Power Co. v. Boston & Worcester R.R.*, 33 Mass. (16 Pick.) 512 (1835); *Wellington, Petitioners*, 33 Mass. (16 Pick.) 87 (1834).

9. *Lumbard v. Stearns*, 58 Mass. (4 Cush.) 60 (1849).

10. 61 Mass. (7 Cush.) 53 (1851).

Amendment incorporated Herbert Spencer's *Social Statics*, the ideas expressed in Shaw's opinions seemed the very epitome of revolutionary socialism. Shaw's name was revered, but the implications of his police-power opinions were politely evaded. In the period between Shaw and the school of Holmes and Brandeis, American law threatened to become the graveyard of general-welfare or public-interest doctrines, and doctrines of vested rights dominated.

The trend toward legal Spencerianism was so pronounced by the end of the nineteenth century that legal historians concentrated on a search for the origins of doctrines of vested rights, almost as if contrary doctrines had never existed. When touching the pre-Civil War period, it is conventional to quote Tocqueville on the conservatism of the American bench and bar, to present American law almost exclusively in terms of Marshall, Story, and Kent, and to emphasize that the rights of property claimed the very warmest affections of the American judiciary. If, however, the work of the state courts were better known, this view of our legal history might be altered. But Gibson and Ruffin and Blackford are little more than distinguished names, their work forgotten. Shaw's superb exposition of the police power is respectfully remembered, but it is usually treated as exceptional, or mistreated as an attempt to confine the police power to the common-law maxim of *sic utere tuo ut alienum non laedas*.<sup>11</sup>

Shaw taught that "all property . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare."<sup>12</sup> Dean Pound, in discussing the "extreme individualist view" of the common law concerning the rights of riparian property owners, says the common law asked simply, "was the defendant acting on his own land and committing no nuisance?"<sup>13</sup> But Shaw believed that the common law of nuisances, which was founded on the *sic utere* maxim, inadequately protected the public, because it was restricted to the abatement of existing nuisances. He believed that the general welfare required the anticipation and prevention of prospective wrongs from the use of private property. Accordingly he held that the legislature might interfere with the use of property before its owner became amenable to the common law. So a man could not even remove stones

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11. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 68 (1934); FREUND, *THE POLICE POWER* 425, § 405 (1904). For an extended discussion of the police power decisions by Shaw, see LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* ch. 13 (1957).

12. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 83-4 (1851).

13. POUND, *THE SPIRIT OF THE COMMON LAW* 53-4 (1921).

from his own beach if prohibited by the legislature, nor erect a wharf on his property beyond boundary lines fixed by it. Even if his use of his property would be "harmless" or "indifferent," the necessity of restraints was to be judged "by those to whom all legislative power is intrusted by the sovereign authority." Similarly the "reasonableness" of such restraints was a matter of "expediency" to be determined by the legislature, not the court. The simple expedient of having a precise statutory rule for the obedience of all was sufficient reason for a finding of constitutionality.<sup>14</sup>

Thus Shaw, using the Commonwealth idea, established a broad base for the police power. He carried the law's conception of the public good and the power of government to protect it a long way from the straitjacketing ideas of Kent and Story. Their position may be summed up in Blackstone's language that "the public good is in nothing more essentially interested than the protection of every individual's private rights."<sup>15</sup>

A few other decisions of the Shaw Court on the police power will illustrate that the Chief Justice's *Alger* opinion was more than rhetoric. The authority of the legislature to shape private banking practices in the public interest was unequivocally sustained in two sweeping opinions. In one, Shaw said that a statute intended to prevent banks from "becoming dangerous to the public" was attacked as unconstitutional on the authority of Marshall, Story, and Kent. The statute allegedly operated retroactively against the bank in question; constituted a legislative assumption of judicial power because it required the Supreme Judicial Court to issue a preliminary injunction against banks on the findings of a government commission; and violated the federal contract clause by providing for a perpetual injunction against the further doing of business, in effect a revocation of the charter. Rufus Choate probably never argued a stronger case. But Shaw sustained the statute and the injunction, peppering his opinion with references to the paramountcy of "the great interests of the community," the duty of the government to "provide security for its citizens," and the legitimacy of interferences with "the liberty of action, and even with the right of property, of such institutions."<sup>16</sup> In a second bank case of the same year, 1839, the Court refused "to raise banks above the control of the legislature." The holding was that a charter could be dissolved at the authority of

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14. Quotations are from Shaw's opinions in the *Alger* case and in *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846).

15. Quoted by POUND, *THE SPIRIT OF THE COMMON LAW* 53 (1921).

16. *Commonwealth v. Farmers & Mechanics Bank*, 38 Mass. (21 Pick.) 542 (1839).

the legislature, under the reserved police power, without a judicial proceeding.<sup>17</sup>

It has been said that from the standpoint of the doctrine of vested rights the most reprehensible legislation ever enacted was the prohibition on the sale of liquor. Such legislation wiped out the value of existing stocks and subjected violators to criminal sanctions, their property to public destruction. Similarly, buildings used for purposes of prostitution or gambling might, on the authority of the legislature, be torn down. The question presented by such statutes was whether the police power could justify uncompensated destruction of private property which had not been appropriated for a public use. The power of the Commonwealth over the health and morals of the public provided Shaw with the basis for sustaining legislation divesting vested rights.<sup>18</sup> On half a dozen occasions, the New York Wynehammer doctrine of substantive due process of law was repudiated in such cases.<sup>19</sup>

Regulation of railroads was another subject for the exercise of the police power, according to the Shaw Court. The same principles that justified grants of eminent domain to railroads, or to canals, bridges, turnpikes, power companies, and water suppliers, also provided the basis for sustaining controls over their rates, profits, and services. Railroads, said Shaw, were a "public work, established by public authority, intended for the public use and benefit . . ."<sup>20</sup> The power to charge rates was "in every respect a public grant, a franchise . . . subject to certain regulations, within the power of government, if it should become excessive."<sup>21</sup>

These dicta by Shaw became holdings at the first moment the railroads challenged the "reasonableness" of the rates and services fixed by government railroad commissions. "Reasonableness" was held to be a matter for determination by the legislature or the commission to which it delegated its powers. Those powers, in turn, were broadly construed. The Court would not interfere with the regulatory process if the railroads had the benefit of notice, hearing, and other

17. *Crease v. Babcock*, 40 Mass. (23 Pick.) 334 (1839).

18. *Commonwealth v. Howe*, 79 Mass. (13 Gray) 26 (1859); *Brown v. Perkins*, 70 Mass. (12 Gray) 89 (1858); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1 (1854); *Commonwealth v. Blackington*, 41 Mass. (24 Pick.) 352 (1837). These are the leading cases among dozens.

19. *E.g.*, *Commonwealth v. Howe*, 79 Mass. (13 Gray) 26 (1859); *Commonwealth v. Logan*, 78 Mass. (12 Gray) 136 (1859); *Commonwealth v. Murphy*, 76 Mass. (10 Gray) 1 (1857); *Calder v. Kurby*, 71 Mass. (5 Gray) 597 (1856); *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482 (1855); *Commonwealth v. Clap*, 71 Mass. (5 Gray) 97 (1855). For the Wynehammer doctrine see, *Wynehammer v. People*, 13 N.Y. 378 (1856); *People v. Toynbee*, 20 Barb. 168 (N.Y. 1855); *Wynehammer v. People*, 20 Barb. 567 (N.Y. 1855).

20. *Worcester v. Western R.R.*, 45 Mass. (4 Met.) 564, 566 (1842).

21. *B. & L. R.R. v. S. & L. R.R.*, 68 Mass. (2 Gray) 1, 29 (1854).

fair procedures.<sup>22</sup> Due process of law to the Shaw Court meant according to legal forms, not according to legislation which the Court approved or disapproved as a matter of policy.

The Shaw Court's latitudinarian attitude toward the police power was influenced by the strong tradition of judicial self-restraint among Massachusetts judges, an outgrowth of the Commonwealth idea. Shaw carried on the tradition of the Massachusetts judiciary. During the thirty years that Shaw presided, there were only ten cases, one unreported, in which the Supreme Judicial Court voided legislative enactments.

Four of these cases in no way related to the police power. One involved a special legislative resolution confirming a private sale that had divested property rights of third persons without compensation.<sup>23</sup> The second concerned an act by which Charlestown was annexed to Boston without providing the citizens of Charlestown with representative districts and an opportunity to vote.<sup>24</sup> The third, an unreported case decided by Shaw sitting alone, involved the "personal liberty act," by which the state sought to evade Congress' Fugitive Slave Law.<sup>25</sup> Here Shaw felt bound by the national Constitution and by a decision of the Supreme Court of the United States. In the fourth case he invalidated a state act which dispensed with the ancient requirement of grand jury proceedings in cases of high crimes.<sup>26</sup> In each of these four, the decisions are above any but trifling criticism.

Of the six cases bearing on the police power, three involved legislation egregiously violating procedural guarantees that are part of our civil liberties.<sup>27</sup> The statutes in question had validly prohibited the sale of liquor. But they invalidly stripped accused persons of virtually every safeguard of criminal justice, from the right to be free from unreasonable searches and seizures to the rights that cluster around the concept of fair trial. Shaw's decisions against these statutes, like his decisions insuring the maintenance of grand jury proceedings and the right to vote, were manifestations of judicial review in its best sense. There were also dicta by Shaw on the point that the legislature cannot restrain the use of property by ex post facto laws, by bills of attainder, or by discriminatory classifications. Thus the limitations

22. *B. & W. RR. v. Western RR.*, 80 Mass. (14 Gray) 253 (1859) and *L. & W. RR. v. Fitchburg RR.*, 80 Mass. (14 Gray) 266 (1859).

23. *Sohier v. Mass. Gen. Hosp.*, 57 Mass. (3 Cush.) 483 (1849).

24. *Warren v. Mayor and Alderman of Charlestown*, 57 Mass. (3 Gray) 84 (1854).

25. *Commonwealth v. Coolidge*, LAW REP. V 482 (Mass. 1843).

26. *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857).

27. *Robinson v. Richardson*, 79 Mass. (13 Gray) 454 (1859); *Sullivan v. Adams*, 69 Mass. (3 Gray) 476 (1855); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1 (1854).



placed upon the police power by the Shaw Court were indispensable to the protection of civil liberties.

The only exception to this generalization consists of the limitation derived from the contract clause of the United States Constitution. But there were only three cases during the long period of Shaw's Chief Justiceship in which this clause was the basis for the invalidation of statutes. In each of the three, the statutes were of limited operation and the decisions made no sacrifice of the public interest. The legislature in one case attempted to regulate in the absence of a reserved power to alter or amend public contracts; the Court left a way open for the legislature's purpose to be achieved under common law.<sup>28</sup> In the other two cases, regulatory powers had been reserved but were exercised in particularly faithless and arbitrary ways; in one case to increase substantially the obligations of a corporation for a second time, in effect doubling a liability which had been paid off; in the other case to repeal an explicit permission for a corporation to increase its capitalization in return for certain services rendered.<sup>29</sup> The legislature in all three cases had passed a high threshold of judicial tolerance for governmental interference with the sanctity of contracts. The decisions were hardly exceptional, considering the facts of the cases and their dates — they were decided between 1854 and 1860, after scores of similar decisions by Federalist, Whig, and Jacksonian jurists alike in state and federal jurisdictions.

The striking fact is that there were so few such decisions by the Shaw Court in thirty years. Handsome opportunities were provided again and again by litigants claiming impairment of their charters of incorporation by a meddlesome legislature. But the Court's decisions were characterized by judicial self-restraint rather than an eagerness to erect a bulwark around chartered rights. The three cases in which statutes were voided for conflict with the contract clause were unusual for the Shaw Court.

Generally the attitude of the Court was typified by Shaw's remark that "immunities and privileges (vested by charter) do not exempt corporations from the operations of those laws made for the general regulation . . . ."<sup>30</sup> He habitually construed public grants in favor of the community and against private interests. When chartered powers

28. *Commonwealth v. New Bedford Bridge*, 68 Mass. (2 Gray) 339 (1854).

29. *Central Bridge Corp. v. City of Lowell*, 81 Mass. (15 Gray) 106 (1860); *Commonwealth v. Essex Co.*, 79 Mass. (13 Gray) 239 (1859). For an extended discussion of judicial review and of constitutional limitations under Shaw see, Levy, *op. cit. supra* note 11, at ch. 14.

30. *Commonwealth v. Farmers & Mechanics Bank*, 38 Mass. (21 Pick.) 542 (1838).

were exercised in the public interest, he usually interpreted them broadly; but when they competed with the right of the community to protect itself or conserve its resources, he interpreted chartered powers narrowly. He did not permit the public control over matters of health, morals, or safety, nor the power of eminent domain, to be alienated by the contract clause.

In the face of such a record it is misleading to picture state courts assiduously searching for doctrines of vested rights to stymie the police power. Certainly no such doctrines appeared in the pre-Civil War decisions of the Supreme Judicial Court of Massachusetts, except for the one doctrine derived by John Marshall from the contract clause and so sparingly used by Shaw. The sources from which vested-rights doctrines were derived by others — the higher law, natural rights, the social compact, and other sources of implied, inherent limitations on majoritarian assemblies — these were invoked by Shaw when he was checking impairments or personal liberties or traditional procedures of criminal justice.

If this picture does not fit the stereotype of conserving Whig jurists, the stereotype may need revision. On the great issue which has historically divided liberals from conservatives in politics — government controls over property and corporations — Shaw supported the government. Even when the Commonwealth idea was being eroded away by those who welcomed the give-away state but not the regulatory state, Shaw was still endorsing a concept of the police power that kept private interests under government surveillance and restraint. He would not permit the Commonwealth idea to become just a rationale for legislative subventions and grants of chartered powers, with business as the only beneficiary. To Shaw, government aid implied government control, because the aid to business was merely incidental to the promotion of the public welfare. No general regulatory statute was invalidated while he was Chief Justice. His conservatism tended to crop out in common law cases where the public interest had not been defined or suggested by statute. In such cases the law was as putty in his hands, shaped to meet the press of business needs. Nothing illustrates this better than the personal injury cases and the variety of novel cases to which railroad corporations were parties. The roar of the first locomotive in Massachusetts signaled the advent of a capitalist revolution in the common law, in the sense that Shaw made railroads the beneficiaries of legal doctrine.<sup>31</sup> To be sure, he believed

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31. See LEVY, *op. cit. supra* note 11, at chs. 8-9 (The Formative Period of Railroad Law).

that he was genuinely serving the general interest on the calculation that what was good for business was good for the Commonwealth.

It was when he had a free hand, in the absence of government action, that the character of his conservatism displayed itself: He construed the law so that corporate industrial interests prevailed over lesser, private ones. An individual farmer, shipper, passenger, worker, or pedestrian, when pitted against a corporation which in Shaw's mind personified industrial expansion and public prosperity, risked a rough sort of justice, whether the issue involved tort or contract.<sup>32</sup> Shaw strictly insisted that individuals look to themselves, not to the law, for protection of life and limb, for his beloved common law was incorrigibly individualistic. The hero of the common law was the property-owning, liberty-loving, self-reliant reasonable man. He was also the hero of American society, celebrated by Jefferson as the free-hold farmer, by Hamilton as the town-merchant, by Jackson as the frontiersman. Between the American image of the common man and the common-law's ideal Everyman, there was a remarkable likeness. It harshly and uncompromisingly treated men as free-willed, self-reliant, risk-and-responsibility taking individuals. Its spirit was, let every man beware and care for himself. That spirit, together with Shaw's belief that the rapid growth of manufacturing and transportation heralded the coming of the good society, tended to minimize the legal liabilities of business.

This was especially striking in cases of industrial accident and personal injury cases generally. For example, when an accident occurred despite all precautions, Shaw held railroads liable for damage to freight but not for injuries to passengers. They, he reasoned, took the risk of accidents that might occur regardless of due care. His opinions went a long way to accentuate the inhumanity of the common law in the area of torts, and simultaneously, to spur capitalist enterprise. Here was the one great area of law in which he failed to protect

32. *Denny v. New York Central R.R.*, 79 Mass. (13 Gray) 481 (1859); *Shaw v. Boston & Worcester R.R.*, 74 Mass. (8 Gray) 45 (1857); *Lucas v. New Bedford & Taunton R.R.*, 72 Mass. (6 Gray) 64 (1856); *Nutting v. Conn. River R.R.*, 67 Mass. (1 Gray) 502 (1854); *Norway Plains Co. v. Boston & Me. R.R.*, 67 Mass. (1 Gray) 263 (1854); *Brown v. Eastern R.R.*, 65 Mass. (11 Cush.) 97 (1853); *Lichtenheim v. Boston & Providence R.R.*, 65 Mass. (11 Cush.) 70 (1853); *Props. of Locks and Canals v. Nashua & Lowell R.R.*, 64 Mass. (10 Cush.) 385 (1852); *Hollenbeck v. Berkshire R.R.*, 63 Mass. (9 Cush.) 478 (1852); *Kearney v. Boston & Worcester R.R.*, 63 Mass. (9 Cush.) 108 (1851); *McElroy v. Nashua & Lowell R.R.*, 58 Mass. (4 Cush.) 400 (1849); *Cary v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475 (1848); *Snow v. Eastern R.R.*, 53 Mass. (12 Met.) 44 (1846); *Lewis v. Western R.R.*, 52 Mass. (11 Met.) 509 (1846); *Draper v. Worcester & Norwich R.R.*, 52 Mass. (11 Met.) 505 (1846); *Worcester v. Western R.R.*, 45 Mass. (4 Met.) 564 (1842); *Thompson v. Boston & Providence R.R.*, *Daily Evening Transcript* (Boston) Jan. 6, 1837; *Gerry v. Boston & Providence R.R.*, *Daily Evening Transcript* (Boston) Dec. 29, 1836.

the public interest. He might have done so without stymying rapid industrialization, because the cost of accidents, if imposed on business, would have been ultimately shifted to the public by a hike in prices and rates.

The rigorous individualism of the common law was especially noticeable in the emergent doctrine of contributory negligence, of which Shaw was a leading exponent.<sup>33</sup> That doctrine required a degree of care and skill which no one but the mythical "prudent" or "reasonable man" of the common law could match. A misstep, however slight, from the ideal standard of conduct, placed upon the injured party the whole burden of his loss, even though the railroad was also at fault and perhaps more so. Comparative rather than contributory negligence would have been a fairer test, or perhaps some rule by which damages could be apportioned.

Probably the furthestmost limit of the common law's individualism in accident cases was expressed in the rule that a right to action is personal and dies with the injured party. This contributed to the related rule that the wrongful death of a human being was no ground for an action of damages.<sup>34</sup> But for the intervention of the legislature, the common law would have left the relatives of victims of fatal accident without a legal remedy to obtain compensation. Shaw would also have made it more profitable for a railroad to kill a man outright than to scratch him, for if he lived he could sue.<sup>35</sup>

The fellow-servant rule was the most far-reaching consequence of individualism in the law as Shaw expounded it.<sup>36</sup> The rule was that a worker who was injured, through no fault of his own, by the negligence of a fellow employee, could not maintain a claim of damages against his employer. Shaw formulated this rule at a strategic moment for employers, because as industrialization expanded at an incredible pace, factory and railroad accidents multiplied frighteningly. Since the fellow-servant rule threw the whole loss from accidents upon innocent workers, capitalism was relieved of an enormous sum that would otherwise have been due as damages. The encouragement of "infant industries" had no greater social cost.

The fellow-servant rule was unmistakably an expression of legal thinking predicated upon the conception that a free man is one who

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33. *Shaw v. B. & W. R.R.*, 74 Mass. (8 Gray) 45 (1857); *Brown v. Kendell*, 60 Mass. (6 Cush.) 292 (1850).

34. *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475 (1848).

35. *Hollenbeck v. Berkshire R.R.*, 63 Mass. (9 Cush.) 478 (1852); *Kearney v. Boston & Worcester R.R.*, 63 Mass. (9 Cush.) 108 (1851).

36. *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49 (1842). See LEVY, *op. cit. supra* note 11, at ch. 10.

is free to work out his own destiny, to pursue the calling of his choice, and to care for himself. If he undertakes a dangerous occupation, he voluntarily assumes the risks to which he has exposed himself. He should know that the others with whom he will have to work may cause him harm by their negligence. He must bear his loss because his voluntary conduct has implied his consent to assume it and to relieve his employer of it. On the other hand, there can be no implication that the employer has contracted to indemnify the worker for the negligence of anyone but himself. The employer, like his employees, is responsible for his own conduct, but cannot be liable without fault.

On such considerations Shaw exempted the employer from liability to his employees, although he was liable to the rest of the world for the injurious acts which they committed in the course of their employment. It is interesting to note that Shaw felt obliged to read the employee's assumption of risk into his contract of employment. This legal fiction also reflected the individualism of a time when it was felt that free men could not be bound except by a contract of their own making.

The public policy which Shaw confidently expounded in support of his reading of the law similarly expressed the independent man: safety would be promoted if each worker guarded himself against his own carelessness and just as prudently watched his neighbor; to remove this responsibility by setting up the liability of the employer would allegedly tend to create individual laxity rather than prudence. So Shaw reasoned. It seems not to have occurred to him that fear of being maimed prompted men to safety anyway, or that contributory negligence barred recovery of damages, or that freeing the employer from liability did not induce him to employ only the most careful persons and to utilize accident-saving devices. Nor, for all his reliance upon the voluntary choice of mature men, did it occur to Shaw that a worker undertook a dangerous occupation and "consented" to its risks because his poverty deprived him of real choice. For that matter, none of these considerations prompted the legislature to supersede the common law with employers' liability and workmen's compensation acts until many decades later. Shaw did no violence to the spirit of his age by the fellow-servant rule, or by the rules he applied in other personal injury cases, particularly those involving wrongful death. In all such cases his enlightened views, so evidenced in police-power cases, were absent, probably because government action was equally absent. On the other hand his exposition of the rule of implied malice in cases of homicide<sup>37</sup>

37. *Commonwealth v. Hawkins*, 72 Mass. (6 Gray) 463 (1855); *Commonwealth v. Webster*, 59 Mass. (3 Cush.) 295 (1850); *Commonwealth v. York*, 50 Mass. (9 Met.) 93 (1845). See LEVY, *op. cit. supra* note 11, at 218-28.

and of the criminal responsibility of the insane<sup>38</sup> accorded with the growing humanitarianism of the day as well as with doctrines of individualism.

Shaw's conservatism tended to manifest itself in cases involving notable social issues of his time. For example he handed down the leading opinion on the constitutionality of the Fugitive Slave Act of 1850;<sup>39</sup> he originated the "separate but equal" doctrine which became the legal linchpin of racial segregation in the public schools throughout the nation;<sup>40</sup> and in the celebrated Abner Kneeland case,<sup>41</sup> he sustained a conviction for blasphemy that grossly abridged freedom of conscience and expression; still another opinion was a bulwark of the establishment of religion which was maintained in Massachusetts until 1833.<sup>42</sup>

But it would be misleading as well as minimally informing to conclude an analysis of Shaw's work by calling him a conservative, for the word reveals little about Shaw if it is also applied to Marshall, Kent, Story, Webster, and Choate.

When Story and Kent, steeped in the crusty lore of the Year Books, were wailing to each other that they were the last of an old race of judges and that Taney's *Charles River Bridge* decision<sup>43</sup> meant that the Constitution was gone,<sup>44</sup> Shaw was calmly noting that property was "fully subject to State regulation" in the interest of the "morals, health, internal commerce, and general prosperity of the community . . . ."<sup>45</sup> In 1860 at the age of eighty, in an opinion which is a little gem in the literature of the common law, he gave fresh evidence of his extraordinary talent for keeping hoary principles viable by adapting them — as he put it — "to new institutions and conditions of society, new modes of commerce, new usages and practices, as the society in the advancement of civilization may require."<sup>46</sup>

Shaw's mind was open to many of the liberal currents of his time. Witness his support from the bench of the free, public education move-

38. *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500 (1844): See LEVY, *op. cit. supra* note 11, at 207-18.

39. *Sims' Case*, 61 Mass. (7 Cush.) 285 (1851). See Levy, *Sims' Case: The Fugitive Slave Law in Boston in 1851*, J. NEGRO HISTORY, 35, 39-74 (1950) and LEVY, *op. cit. supra* note 11, at ch. 6.

40. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849). See Levy & Phillips, *The Roberts Case: Source of the 'Separate But Equal' Doctrine*, AM. HIST. REV. 56, 510-18 (1951) and LEVY, *op. cit. supra* note 11, at ch. 7.

41. *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (1838). See Levy, *Satan's Last Apostle in Massachusetts*, AMERICAN QUARTERLY V, 16-30 (1953) and LEVY, *op. cit. supra* note 11, at ch. 5.

42. *Stebbins v. Jennings*, 27 Mass. (10 Pick.) 172 (1830). See LEVY, *op. cit. supra* note 11, at ch. 3.

43. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

44. HORTON, JAMES KENT 293-95 (1939); SWISHER, ROGER B. TANEY 377-79 (1936).

45. *Commonwealth v. Kimball*, 41 Mass. (24 Pick.) 359, 363 (1837).

46. *Commonwealth v. Temple*, 77 Mass. (14 Gray) 69, 74 (1859).

ment,<sup>47</sup> or his public-interest doctrines,<sup>48</sup> or his defense of trade-union activities,<sup>49</sup> or his freeing sojourner slaves. While Shaw was Chief Justice all slaves whom fate brought to Massachusetts were guaranteed liberty, except for runaways. Whether they were brought by their masters who were temporarily visiting the Commonwealth or were just passing through, or whether they were cast up by the sea, they were set free by Shaw's definition of the law. Bound by neither precedent nor statute, he made that law. The principle of comity, he ruled, could not extend to human beings as property: because slavery was so odious and founded upon brute force it could exist only when sanctioned by positive, local law. There being no such law in Massachusetts, Shaw freed even slave seamen in the service of the United States Navy if they reached a port within his jurisdiction.<sup>50</sup>

In the area of criminal law dealing with conspiracies, Shaw seems on first glance to have run counter to individualist doctrines. He held, in what is probably his best-known opinion,<sup>51</sup> that a combination of workers to establish and maintain a closed shop by the use of peaceable coercion is not an indictable conspiracy even if it tends to injure employers. Shaw also indicated that he saw nothing unlawful in a peaceable, concerted effort to raise wages.

But other judges had been persuaded by the ideology of individualism, or at least used its rhetoric, to find criminality in trade-union activity and even in unions per se. Combination, labor's most effective means of economic improvement, was the very basis of the ancient doctrine of criminal conspiracy and the denial of individual effort. The closed shop was regarded as a hateful form of monopoly by labor, organized action to raise wages as coercion, and both regarded as injurious to the workers themselves, as well as to trade and the public at large. When so much store was placed in self-reliance, the only proper way in law and economics for employees to better themselves seemed to be by atomistic bargaining. Unions were thought to impede the natural operation of free competition by individuals on both sides of the labor market. Or so Shaw's contemporaries and earlier judges had believed.

47. SHAW, A CHARGE DELIVERED TO THE GRAND JURY FOR THE COUNTY OF ESSEX, MAY TERM 1832 15-16 (1832).

48. See notes 6 through 9, *supra*.

49. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842).

50. The leading case is Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1936). See also Betty's Case, LAW REP. XX, 455 (1857); Commonwealth v. Fitzgerald, LAW REP. VII, 379 (Mass. 1844); Commonwealth v. Porterfield, LAW REP. VII, 256 (Mass. 1844); Commonwealth v. Ludlum, The Liberator (Boston) Aug. 31, 1841; Anne v. Eames (1836) in Report of the Holden Slave Case, Holden Anti-Slavery Society pamphlet (1839); Commonwealth v. Howard, AM. JUR. IX, 490 (1832).

51. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842). See LEVY, *op. cit. supra* note 11, at ch. 11.

Individualism, however, has many facets, and like maxims relating to liberty, the free market, or competition, can be conscripted into the service of more than one cause. If self-reliance was one attribute of individualism, the pursuit of self-interest was another. As Tocqueville noted, where individualism and freedom prevail, men pursue their self-interest and express themselves by developing an astonishing proclivity for association. As soon as several Americans of like interest "have found one another out, they combine," observed Tocqueville. Shaw too noted the "general tendency of society in our times, to combine men into bodies and associations having some object of deep interest common to themselves . . . ."<sup>52</sup> He understood that freedom meant combination.

When the question arose whether it was criminal for a combination of employees to refuse to work for one who employed non-union labor, Shaw replied in the disarming language of individualism that men who are not bound by contract are "free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive, that it is criminal for men to agree together to exercise their acknowledged rights, in such a manner as best to subserve their own interests."<sup>53</sup>

He acknowledged that the pursuit of their own interests might result in injury to third parties, but that did not in his opinion make their combination criminal in the absence of fraud, violence, or other illegal behavior. To Shaw's mind the pursuit of self-interest was a hard, competitive game in which atomistic individuals stood less chance of getting hurt by joining forces. He also seems to have considered bargaining between capital and labor as a form of competition whose benefits to society, like those from competition of any kind, outweighed the costs. Finally, he was fair enough to believe that labor was entitled to combine if business could, and wary enough to understand that if the conspiracy doctrine were not modified, it might boomerang against combinations of businessmen who competed too energetically. Thus Shaw drew different conclusions from premises which he shared with others concerning individualism, freedom, and competition. The result of his interpretation of the criminal law of conspiracies was that the newly emerging trade-union movement was left viable.

But the corporate movement was left viable too, a fact which helps reconcile the fellow-servant and trade-union decisions. To regard one as "anti-labor" and the other as "pro-labor" adds nothing to an under-

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52. SHAW, *op. cit. supra* note 47, at 7-8.

53. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 130 (1842).



standing of two cases governed by different legal considerations; on the one hand tort and contract, on the other criminal conspiracy. The fellow-servant case belongs to a line of harsh personal injury decisions that were unrelated to labor as such. To be sure, labor was saddled with much of the cost of industrial accidents, but victims of other accidents hardly fared better. The fellow-servant decision also represented a departure of the maxim *respondeat superior* which might impose liability without fault; while the trade-union decision, intended in part to draw the fangs of labor's support of the codification movement, represented a departure from Hawkin's conspiracy doctrine which might impose criminality on business as well as labor.

Despite the conflicting impact of the two decisions on labor's fortunes and the fact that they are not comparable from a legal standpoint they harmonize as a part of Shaw's thought. He regarded the worker as a free agent competing with his employer as to the terms of employment, at liberty to refuse work if his demands were not met. As the best judge of his own welfare, he might assume risks, combine in a closed shop, or make other choices. For Shaw, workers possessed the same freedom of action enjoyed by employers against labor and against business rivals.

Compared to such Whig peers as Webster, Story, and Choate, Shaw was quite liberal in many respects. Indeed his judicial record is remarkably like the record one might expect from a jurist of the Jacksonian persuasion. Marcus Morton, during ten years of service as Shaw's associate, found it necessary to dissent only once, in *Kneeland's* case. No doubt the inherited legal tradition created an area of agreement among American jurists that was more influential in the decision-making process than party differences. Yet it is revealing that many of Shaw's opinions might conceivably have been written by a Gibson, but not by a Kent. It was not just the taught tradition of the common law which Shaw and Gibson shared; they shared also taught traditions of judicial self-restraint, of the positive state, and the "Commonwealth idea," a term that is meaningful in Pennsylvania's history as well as in Massachusetts'.<sup>54</sup>

But personality makes a difference in law as in politics. It oversimplifies to say, as Pound has, that the "chiefest factor in determining the course which legal development will take with respect to any new situation or new problem is the analogy or analogies that chance to be at hand . . . ."<sup>55</sup> There are usually conflicting and alternative analogies,

54. See generally HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948).

55. POUND, *THE SPIRIT OF THE COMMON LAW* 12 (1921).

rules, and precedents from among which judges may choose. The direction of choice is shaped by such personal factors as the judge's calculation of the community's needs, his theory of the function of government, his concept of the role of the court, inexpressible intuitions, unrecognized predilections, and perhaps doting biases. It is difficult to name a single major case decided by Shaw which might not have gone the other way had another been sitting in his place.

Shaw interpreted the received law as he understood it, and his understanding was colored by his own presuppositions, particularly in respect to those interests and values he thought the legal order should secure. Few other judges have been so earnestly and consciously concerned with the public policy implicit in the principle of a case.

Much of his greatness lay in this concern for principle and policy. "It is not enough," he observed, "to say, that the law is so established . . . The rule may be a good rule . . . But some better reason must be given for it than that, so it was enacted, or so it was decided."<sup>56</sup> He thought it necessary to search out the rule which governed a case; to ask "upon what principle is it founded?" and to deliver a disquisition on the subject, with copious illustrations for the guidance of the future. From the bench he was one of the nation's foremost teachers of law.

His opinions did not overlook the question "*cui bono?*" which, he believed, "applies perhaps with still greater force to the laws, than to any other subject."<sup>57</sup> That is why he fixed "enlightened public policy" at the root of all legal principles, along with "reason" and "natural justice."<sup>58</sup> He understood that American law was a functioning instrument of a free society, embodying its ideals, serving its interests. It is not surprising, then, that he tended to minimize precedent and place his decisions on broad grounds of social advantage. Justice Holmes, attributing Shaw's greatness to his "accurate appreciation of the requirements of the community," thought that "few have lived who were his equals in their understanding of the grounds of public policy to which all laws must be ultimately referred. It was this which made him . . . the greatest magistrate which this country has produced."<sup>59</sup> To be sure, he made errors of judgment and policy. Yet the wonder is that his errors were so few, considering the record number of opinions which he delivered, on so many novel questions, in so many fields of law.

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56. Shaw, *Profession of the Law in the United States*. (Extract from an address delivered before the Suffolk Bar, May, 1827) AM. JUR. VII, 56-65 (1832).

57. *Ibid.*

58. *Norway Plains Co. v. Boston & Me. R.R.*, 67 Mass. (1 Gray) 263, 267 (1854).

59. HOLMES, *THE COMMON LAW* 106 (1881).

Perhaps his chief contribution was his day-by-day domestication of the English common law. He made it plastic and practical, preserving its continuities with what was worthwhile in the past, yet accommodating it to the ideals and shifting imperatives of American life. The Massachusetts Bar made a similar evaluation of his work when honoring the "old Chief" upon his resignation. The Bar, speaking through a distinguished committee, declared:

It was the task of those who went before you, to show that the principles of the common and the commercial law were available to the wants of communities which were far more recent than the origin of those systems. It was for you to adapt those systems to still newer and greater exigencies; to extend them to the solution of questions, which it required a profound sagacity to foresee, and for which an intimate knowledge of the law often enabled you to provide, before they had even fully arisen for judgment. Thus it has been that in your hands the law has met the demands of a period of unexampled activity and enterprise; while over all its varied and conflicting interests you have held the strong, conservative sway of a judge, who moulds the rule for the present and the future out of the principles and precedents of the past. Thus too it has been, that every tribunal in the country has felt the weight of your judgments, and jurists at home and abroad look to you as one of the great expositors of the law.<sup>60</sup>

Time has not diminished the force of this observation. As Professor Chafee has noted, "Probably no other state judge has so deeply influenced the development of commercial and constitutional law throughout the nation. Almost all the principles laid down by him have proved sound . . . ."<sup>61</sup>

He was sound in more than his principles. Like John Quincy Adams, his fellow Bay-Statesman whom he resembled in so many ways, he made his name a synonym for integrity, impartiality, and independence. Towering above class and party, doing everything for justice and nothing for fear or favor, he was a model for the American judicial character. And none but an Adams could compare with Shaw in his overpowering sense of public service and devotion to the good of the whole community. His achievement as a jurist is to be sought in his constructive influence upon the law of our country and in the fact so perfectly summed up in a tribute to him on his death: life, liberty, and property were safe in his hands.

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60. Address on Chief Justice Shaw's resignation, Sept. 10, 1860, Supplement, 81 Mass. 599, 603 (1860).

61. Chafee, *Lemuel Shaw*, *Dictionary of American Biography*.